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No. 86-357

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether Pennsylvania's axle tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because, by simultaneously reducing registration fees for trucks registered in the State by amounts equal to the tax, Pennsylvania has caused the tax to be borne almost entirely by trucks registered outside the State.

2. Whether Pennsylvania's axle tax statute and its predecessor marker fee statute discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution because each imposes a substantially higher effective tax rate on trucks registered outside the State than on trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are plaintiff classes consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who were subject to the $25 identification marker fee requirement or who were, are, or will be subject to the axle tax, in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Astro Container Company, which has no subsidiaries or affiliates, is a division of Allied Drum Services, Inc.

Appellant Interstate Truck Leasing, Inc., which has no affiliates or subsidiaries, is a subsidiary of Fred Taylor Company, Inc.

Appellant Interstate Van Lines, Inc., is a subsidiary of I.V.L. Corp. Interstate Van Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Ace Van & Storage Co., Inc.; A.E.M. Inc.; and Interstate International Inc.

Appellant Old Dominion Freight Line Inc. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Old Dominion Tank Leasing, Inc.; E & J Enterprises; Deaton, Inc.; and Road-Runners Freight System.

Appellant Tri-State Motor Transit Co. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Contract Operators Accounting Service; Aero Body & Truck Equipment, Inc.; LTL Leasing Co.; Loadus Truck Leasing, Inc.; H.G.O. Rigging & Storage Inc.; LKO Leasing Co.; Central States Transportation Co.; and J. H. Rose Truck Lines Co.

Appellant Anderson Trucking Services, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are St. Cloud Truck Sales; K & W Trucking Co., Inc.; H. E. Anderson Equipment Leasing; and R.B.J. Industries, Inc.

Appellees are the following defendant state officials, or their successors: James I. Scheiner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania; Leroy S. Zimmerman, Attorney General of the Commonwealth of Pennsylvania; and Nicholas G. Dellacipeste, Commissioner of the State Police of the Commonwealth of Pennsylvania.

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On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (J.S. App. A) is reported at 509 A.2d 838. The opinions of the en banc Commonwealth Court (J.S. Apps. C, D, and E) are reported at 87 Pa. Commw. 345, 487 A.2d 468 (marker fee), 87 Pa. Commw. 379, 487 A.2d 465 (axle tax), and 87 Pa. Commw. 418, 489 A.2d 269 (marker fee refund), respectively. The opinion of the single Commonwealth Court judge in the marker fee case (J.S. App. F) is reported at 77 Pa. Commw. 575, 466 A.2d 755.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (J.S. App. B) was entered on May 6, 1986. Notices of appeal to this Court (J.S. Apps. G, H, and I) were filed on June 16, 1986. On July 25, 1986, Justice Brennan

extended the time within which to docket the appeal to September 3, 1986, and the appeal was docketed on that date. The Court noted probable jurisdiction on November 10, 1986 (J.A. 267). The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The relevant statutes are set forth at J.S. App. 80a-91a.

STATEMENT

Like all other states, Pennsylvania requires funds to finance the construction, maintenance, and repair of its roads, bridges, and tunnels. Also like other states, Pennsylvania raises the funds largely through taxes and fees levied on the users of its highways. A substantial proportion of these taxes is paid by interstate motor carriers. Appellant American Trucking Associations, Inc. ("ATA"), as their representative, has brought this suit not because of any objection to the raising of revenues by highway user charges or to the level of revenues Pennsylvania seeks to raise, but solely because the discriminatory nature of the two highway use taxes Pennsylvania has adopted—the marker fee and its successor, the axle tax—favors local interests at the expense of interstate commerce.

This discrimination takes two forms. The first, which relates solely to the axle tax, derives from the purposeful manipulation of Pennsylvania's highway tax system to impose almost the entire burden of the axle tax on vehicles registered in other states. This was accomplished by enacting a reduction in Pennsylvania truck registration fees simultaneously with and, in virtually all instances, identical in amount to the newly created axle tax.

The axle tax also suffers from an independent and equally fatal flaw, which infects the marker fee as well. Under both taxes, the payment a truck must make to

drive on Pennsylvania's highways is essentially a fixed amount that does not vary with the extent to which the truck actually uses those highways. As common sense suggests, and as the record in this case demonstrates, the average Pennsylvania-based truck travels many more miles on the State's highways than its otherwise identical counterparts registered in other states. Nevertheless, it pays no greater tax than out-of-state trucks, and therefore it is able to spread the same tax over many more miles of in-state operations. This gives the Pennsylvania truck a substantial economic advantage over out-of-state competitors.

The Supreme Court of Pennsylvania rejected both Commerce Clause challenges, relying on an analysis that, if accepted by this Court, would encourage the adoption of discriminatory state taxation that is burdensome to interstate commerce at best and potentially crippling at worst.

A. The Pennsylvania Tax Statutes.

Pennsylvania imposes a variety of taxes and fees on users of its highways, including uncontroversial ones such as vehicle registration fees and taxes on fuel purchased or used there. The revenues from Pennsylvania's highway taxes are placed in its Motor License Fund and expended for highway construction and maintenance or other road-related purposes (J.S. App. 2a-3a). The current controversy arises because of Pennsylvania's adoption, beginning in 1980, of new forms of highway use taxation that fall disproportionately upon out-of-state truckers—a discrimination compounded in the case of the axle tax by Pennsylvania's manipulation of its tax system to relieve its own truckers of virtually the entire cost of the tax.

1. *The Marker Fee.* In June 1980, Title 75 of Pennsylvania's Vehicle Code was amended to increase from $2 to $25 the identification marker fee that motor carrier vehicles (*i.e.*, trucks, truck tractors, or combinations)

registered outside Pennsylvania and weighing more than 17,000 pounds had to pay as a condition of operating on the State's highways. 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1981) (J.S. App. 80a-81a). Marker fee payments were required only for non-Pennsylvania-based trucks. For trucks registered in Pennsylvania, the fee was "deemed a part of and included in the vehicle registration fee." *Id.* at § 2102(b) (J.S. App. 6a).

The $25 marker fee was a tax for the privilege of using Pennsylvania's roads; the administrative cost associated with the issuance of the markers was stipulated to be approximately $5 per vehicle. See J.A. 21-22. The marker fee payments generated substantial revenues. For the 12 months beginning April 1, 1981, decals were purchased for nearly 400,000 non-Pennsylvania-based trucks at a cost of approximately $10 million (R. 267, 465).

2. *The Axle Tax.* By legislation (sometimes referred to as "Act 234") passed in December 1982 and effective April 1, 1983, the marker fee was reduced to $5 per year.[1] At the same time, however, Act 234 instituted a much larger impost—the axle tax, which remains in effect today. 75 Pa. Cons. Stat. Ann. § 9901 *et seq.* (J.S. App. 82a-86a). This tax, which applies to trucks weighing more than 26,000 pounds, requires an annual payment of $36 per axle. Trucks subject to the tax have between two and five axles and therefore pay an annual tax of from $72 to $180.[2] Before rebates, the axle tax raised approximately $80 million in fiscal year 1983-84, of which about $68 million was paid for trucks registered in states other than Pennsylvania (J.A. 207).

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[1] Because this amount was stipulated to reflect costs actually incurred in administering the marker (decal) system, appellants have not contested the lawfulness of the reduced fee.

[2] Vehicles traveling fewer than 2,000 miles a year in Pennsylvania may obtain a rebate of this tax proportionate to their reduced mileage (J.S. App. 83a-84a).

The stated purpose of the axle tax is "to provide for the creation of jobs and the rehiring of [Pennsylvania's] unemployed." 75 Pa. Cons. Stat. Ann. § 9907(b) (J.S. App. 84a). All axle tax proceeds are placed in a new Highway Bridge Improvement Restricted Account within the Motor License Fund. The law promotes Pennsylvania employment by requiring that firms with Pennsylvania-based facilities be "actively solicited to make bids on contracts to furnish products and materials" to be used in projects funded by the Account (*id.* at 84a-85a).

The axle tax on its face applies equally to Pennsylvania-based and non-Pennsylvania-based trucks. However, the same enactment that created the axle tax also provided for a simultaneous reduction in registration fees paid by Pennsylvania-based trucks subject to the axle tax. This reduction was in nearly all instances identical in amount to the axle tax. J.S. App. 9a, 30a, 40a n.1 (table); J.A. 260. The result of this manipulation is that the cost of the axle tax has been borne almost entirely by interstate truckers operating non-Pennsylvania-based vehicles on the State's highways, while Pennsylvania-based operators have been largely relieved of any financial burden despite their nominal obligation to pay the tax.[3]

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[3] Under the International Registration Plan ("IRP"), to which Pennsylvania and 34 other states belong, registration fees paid for a truck are apportioned among member states in accordance with the percentage of total miles driven by the truck in each state. Thus, if a truck registered in some other IRP state drove 10% of its total miles in Pennsylvania, it would pay 10% of Pennsylvania's registration fee. Conversely, a Pennsylvania-registered truck that drove 50% of its miles in other IRP states would pay appropriate proportions of those other states' registration fees, while paying Pennsylvania only 50% of its fee. The operation of the IRP is described briefly by the court below at J.S. App. 5a & n.2. For the reasons explained by the dissent (*id.* at 45a-46a), however, the fact that the IRP slightly reduces the impact of the registration fee reduction in the case of some affected taxpayers does not eliminate the discrimination or remove the Commerce Clause objections to it.

Even apart from the reduction in registration fees, the cost of the axle tax, like that of the marker fee that preceded it, falls disproportionately on out-of-state vehicles. Because these taxes are basically for a fixed amount, their per-mile cost declines with increased use of Pennsylvania's highways. And as the records in both the marker fee and the axle tax cases establish, the typical Pennsylvania-based vehicle drives many more miles on the State's highways than its non-Pennsylvania-based counterpart. For example, evidence introduced in the marker fee case, based principally on state tax records and responses to a survey conducted by appellant ATA, showed that in 1981 Pennsylvania-based trucks traveled an average of nearly 23,000 miles each on the State's roads, whereas foreign-based trucks averaged slightly over 4,500 miles apiece. J.A. 99, 101, 104. These data reflect an average per-mile tax cost for vehicles registered outside of Pennsylvania that is more than 5 times the cost for in-state vehicles. Equally striking was evidence showing that while Pennsylvania-registered trucks were responsible for between 45% and 65% of all miles driven on Pennsylvania's highways by trucks subject to the axle tax (compare J.A. 195 with J.A. 99, 101), their payments accounted for less than 16% of total axle tax revenues (J.A. 207).

B. The Proceedings Below.

The subject of this appeal is the judgment of the Supreme Court of Pennsylvania in consolidated cases that appellants originally brought in the Commonwealth Court.

1. *ATA I*, filed in February 1982, challenged the validity of the marker fee statute under the Commerce Clause of the United States Constitution. The statute was challenged for two reasons. First, because by its terms it applied only to trucks registered outside Pennsylvania, the marker fee was attacked as facially discriminatory. Second, because of its substantially disparate cost-per-mile impact on Pennsylvania-based and non-Pennsylvania-

based trucks arising from in-state vehicles' greater use of Pennsylvania roads, the marker fee was attacked as discriminatory in effect.

Following the certification of a plaintiff class consisting of non-Pennsylvania-based interstate motor carriers subject to the marker fee requirement (see J.S. App. 10a), the Commonwealth Court held the marker fee facially discriminatory and therefore unconstitutional under the Commerce Clause. The court based its ruling on the manner of adoption of the marker fee system, which impermissibly placed the entire burden of the tax on vehicles registered outside of Pennsylvania (*id.* at 70a-72a). In view of that holding, the court found it unnecessary to consider appellants' contention that the fee was unconstitutional because of its discriminatory cost-per-mile impact (*id.* at 73a). The en banc Commonwealth Court held the marker fee invalid on essentially the same ground (*id.* at 52a-57a).[4]

2. *ATA II* was a class action brought by appellants in the Commonwealth Court in January 1983, on the heels of the enactment of the axle tax and in advance of its effective date. On cross-motions for summary judgment, appellants prevailed before the en banc Commonwealth Court, which found the tax facially discriminatory against interstate commerce (J.S. App. 61a):

> Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign,

[4] A separate case ("*ATA III*") was brought in the Commonwealth Court and consolidated in the Pennsylvania Supreme Court with respect to marker fee refunds for the period prior to the suit in *ATA I*. See J.S. 8. It is part of the instant appeal, but presents no different federal issue and therefore requires no independent discussion.

> registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

Again, because the court found that the tax discriminated on its face, it did not consider the challenge based on discriminatory effect (*id.* at 62a n.4).

3. The State appealed to the Supreme Court of Pennsylvania, which, in a split decision, reversed the lower court and upheld both the marker fee and the axle tax. J.S. App. A.

The court rejected the argument that the marker fee and the axle tax were discriminatory in operation because, not being proportioned to the extent of highway use, they imposed higher per-mile costs on trucks registered outside of Pennsylvania (which generally make substantially lesser use of its highways) than on those registered within it. The court viewed this contention as raising an objection under the "fourth facet" of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), *i.e.*, whether the fee or tax is "fairly related" to the services provided by the State (J.S. App. 24a, 34a).[5] Because of the high costs of maintaining Pennsylvania's highways, the court found that the marker fee and axle tax were not excessive or manifestly disproportionate and therefore were "fairly related" to the highway construction and maintenance services provided by the State to out-of-state vehicles (*id.* at 29a). The court further asserted that any difference in the impact of the taxes on local and out-of-state truckers was "inconsequential to our Commerce Clause analysis" (*id.* at 28a (emphasis in original)):

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[5] The court noted (J.S. App. 25a n.15) that appellants also challenged the cost-per-mile effect of the taxes under the third prong of the *Complete Auto* test, which condemns state taxes that discriminate against interstate commerce.

> Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them.

In addition, with respect to the axle tax, the court acknowledged the simultaneous reduction of registration fees that accompanied enactment of the tax and characterized appellants' discrimination argument as "[a]t first blush . . . appealing" (J.S. App. 31a). Nevertheless, it agreed with the State that the arrangement under which the burden of the tax fell almost entirely on out-of-state truckers was defensible as a "rational restructuring" of tax obligations (*ibid.*). The court stated that it "need go no further" (*id.* at 32a) than a comparison of the axle tax to the much higher registration fees, which it believed demonstrated that vehicles registered in Pennsylvania still were required to pay more for the privilege of using the State's highways than were their non-Pennsylvania counterparts (*id.* at 33a):

> [C]onsidered in conjunction with all other provisions of Pennsylvania's highway user fee system, [the axle tax] works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

The court added that any discriminatory or protectionist motive the legislature may have held was immaterial if the tax was otherwise lawful (*id.* at 34a-35a).[6]

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[6] The court also rejected (J.S. App. 22a-24a) on state law grounds the additional argument that the marker fee was not paid at all by Pennsylvania-registered trucks and was therefore facially discriminatory. That holding is not involved in this appeal.

Two justices dissented with respect to the constitutionality of the axle tax. In an opinion by Chief Justice Nix, they concluded that the axle tax violated the Commerce Clause because its burden fell almost entirely on non-Pennsylvania-based truckers. The dissent first noted (J.S. App. 39a) that it is "incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect." Applying that test, the dissent concluded (*id.* at 41a) that the offsetting reductions in registration fees that accompanied adoption of the axle tax gave the tax an "unequal financial impact" that facially discriminated against interstate commerce. The dissent further observed (*ibid.*) that "there is nothing in the statute itself or in the circumstances surrounding [its] enactment" to support the court's conclusion that the statute was intended to effect a "rational restructuring" of tax burdens; instead, the expressed purpose was the parochial one of providing jobs for Pennsylvania's unemployed.

The dissent also explained the fallacy of the court's holding that any discrimination in the imposition of the axle tax was justified by the supposition that it merely compensated for registration fees, which are paid only by locally-based trucks (J.S. App. 44a-45a (emphasis in original)):

> What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. . . . The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.

INTRODUCTION AND SUMMARY OF ARGUMENT

State legislatures are naturally tempted to raise needed revenues in the manner most agreeable to the voters who elect them. If they can shift to outsiders the burdens of providing for their state's needs, they will likely do so. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).[7] It was in part a recognition of these tendencies—and of the destructive impact that parochial economic legislation could have on the union of states—that led to the adoption of the Commerce Clause. This case involves the effectiveness of that provision as an instrument for safeguarding the rights of persons seeking to do business in states other than their own against discrimination that favors local enterprise.

The problem is not simply the unfair and inhibiting character of any particular state's discriminatory actions, but the reverberations such actions produce. They provoke retaliatory enactments from other states that threaten the creation of numerous preferential trade areas and endanger the "free trade which the [Commerce] Clause protects." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977). Such artificial impediments to the free flow of commerce also obstruct market forces and economic efficiency and interfere with rational, tax-neutral decision-making. See *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406 (1984).

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[7] As one noted commentator has observed:

> Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states. Such an incentive is undesirable. It . . . deflects the state from the search for taxing methods that maximize efficiency and distributive criteria for the nation as a whole. . . . States may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents. . . . [S]ince special interests frequently obtain legislation that reduces efficiency, we should not be surprised to find that with states as with nations, taxes that discriminate against importers are sometimes imposed.

R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986).

Accordingly, state legislation that discriminates in favor of in-state over out-of-state interests is subject to "the strictest scrutiny." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 106 S.Ct. 2080, 2084 (1986).

Under these principles, a state tax is unconstitutional either (1) if it expressly discriminates or is structured in relation to other tax statutes to discriminate against interstate commerce, or (2) if in its effect and practical operation it so discriminates. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 (1981). The Pennsylvania axle tax violates the first of these proscriptions, and both the axle tax and the marker fee violate the second.

I.

The axle tax plainly is structured to discriminate against out-of-state taxpayers. The statute enacting it, while purportedly taxing in-state and out-of-state vehicles alike, simultaneously reduced the registration fees for Pennsylvania-registered trucks by an amount identical to the axle tax in nearly all cases, thereby causing virtually the entire impact of the new levy to fall on out-of-state operators. This manipulation of the highway tax system, which the State admits was intended to benefit local truckers, renders the tax legally equivalent to one imposed solely on non-Pennsylvania-based operators.

This discrimination against interstate commerce cannot be justified under the "compensatory tax" doctrine. For that doctrine to apply, the challenged tax must offset a tax imposed *solely on in-state interests* for a *substantially equivalent* taxable event, so that the overall tax system results in an equal tax burden for in-state

and out-of-state taxpayers. *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 (1984). Appellees have failed to sustain their burden of showing that the axle tax meets this standard.

First, truck registration fees do not constitute a tax solely on Pennsylvania-based trucks, for which the axle tax could be viewed as compensating. *All* trucks operating in Pennsylvania already satisfy that State's registration fee requirement. Those that are base-registered in Pennsylvania or in another IRP state make payments to Pennsylvania; those based in other states satisfy the same requirement by paying their home state's registration fee pursuant to reciprocity arrangements between Pennsylvania and those other states. Second, the axle tax and the registration fee do not relate to substantially equivalent events. Payment of Pennsylvania's registration fee entitles a Pennsylvania-based truck to engage in Pennsylvania-intrastate as well as in interstate operations and, under reciprocity arrangements, to use the highways in many states; on the other hand, the axle tax enables a non-Pennsylvania-based truck to operate only in Pennsylvania and to do so only for interstate carriage. Third, appellees have presented no evidence showing that the legislature intended the axle tax to redress any existing imbalance in tax burdens or that it actually had that effect.

Not surprisingly, in the face of this Court's precedents, the State now concedes that the compensatory tax doctrine does not support the axle tax and that the Pennsylvania Supreme Court's reliance on that doctrine was erroneous.

II.

By imposing essentially flat charges that do not vary according to highway mileage, both the axle tax and the marker fee discriminate in practical effect against out-of-state trucks. Since these taxes are not proportional to the extent of a vehicle's use of the roads within Pennsylvania, they result in per-mile costs that are much

lower for heavy users of the State's highways than for less frequent users. And as common experience suggests and the record in this case demonstrates, the average Pennsylvania-registered truck uses the roads in the State far more extensively than the average out-of-state truck and thus enjoys the benefit of a lower effective per-mile tax rate. Furthermore, the non-proportional measure of these taxes, which were intended to compensate the State for deterioration to its highways caused by the operation of larger trucks, in fact bears no relationship to the level of use that a truck actually makes of the State's roads or the amount of wear and tear attributable to its operations.

A state tax violates the Commerce Clause if it has a discriminatory impact on interstate commerce or is not fairly related to the services provided by the state. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). This Court's decisions recognize that a flat tax, which by definition is not proportional to the taxpayer's activities, necessarily operates to discriminate against interstate commerce because of the out-of-state taxpayer's lesser presence in the state. See *Nippert* v. *Richmond*, 327 U.S. 416 (1946). It follows that taxes like the axle tax and marker fee, which result in a disproportionate burden on out-of-state taxpayers and employ a measure unrelated to the services furnished by the State, are invalid.

The adoption of comparable taxes by other states would impose a devastating cumulative burden on interstate motor carriers. Indeed, since 1980 six states have followed Pennsylvania's lead and enacted flat highway taxes. In response to these discriminatory exactions, a number of other states have imposed retaliatory highway taxes, thereby exacerbating the discrimination against and burden on interstate trucks. This trade war among the states, involving local preferences and retaliatory countermeasures, is particularly injurious to the trucking industry and is precisely the sort of economic conflict that the Commerce Clause was designed to prevent.

This Court's decision of a half-century ago in *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), cannot serve to justify these adverse effects on interstate commerce. That case is inconsistent with Commerce Clause principles recognized in subsequent opinions of this Court and fails to account for the practical realities of the modern interstate trucking industry. Since every state today employs mileage-related highway taxes that provide a workable alternative for compensating the state for wear and tear to its roads, there is no need to sustain discriminatory state taxation.

ARGUMENT

I. THE PENNSYLVANIA AXLE TAX VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS STRUCTURED TO FALL ALMOST ENTIRELY ON OUT-OF-STATE TRUCKS.

The legislation enacting the Pennsylvania axle tax also reduced the registration fees for Pennsylvania-based trucks subject to the tax by the amount of the new levy. Thus, while the axle tax appears on its face to apply equally to in-state and out-of-state trucks, the simultaneous and offsetting reduction in Pennsylvania's registration fees effectively relieves in-state trucks of the burden of the axle tax and imposes virtually the entire cost of the tax on interstate truckers operating non-Pennsylvania-based vehicles on the State's highways. As of the effective date of the axle tax, for example, the owner of a five-axle truck registered in New Jersey who wished to engage in interstate commerce on Pennsylvania's highways had to pay a new tax of $180 for the privilege. If the same truck were registered in Pennsylvania, however, it would not have had to pay a penny more to Pennsylvania in order to conduct identical operations on the same highways. In fact, the axle tax drew a prompt reaction from New Jersey, whose legislature adopted a resolution describing it as "causing great hardship for the owners of trucks registered in New Jersey [and] . . . other states" and condemning the tax as "highly

inequitable inasmuch as the principal burden falls upon truck owners who are not resident in Pennsylvania." J. Res. 10, 200th Leg., 2d Sess., 1983 N.J. Sess. Law Serv. 1478 (West) (reproduced as an Appendix, *infra*, pages 1a-2a).

The Pennsylvania Supreme Court acknowledged (J.S. App. 30a-31a), and appellees concede (*id.* at 31a; Mot. to Aff. 7-8), that the actual burden of the axle tax falls almost entirely on out-of-state trucks. In the words of the court below, Pennsylvania "intended to lessen the burden imposed upon 'local commerce'" by imposing a new burden on out-of-state competitors. J.S. App. 31a. Because Pennsylvania has structured the axle tax to discriminate against non-Pennsylvania-based trucks, the tax runs afoul of the most basic requirements of the Commerce Clause.

A. The Axle Tax Effectively Applies Only To Out-Of-State Trucks.

1. *The Anti-Discrimination Principle.* The decisions of this Court have long established that the Commerce Clause prohibits state taxes that expressly favor in-state over out-of-state commerce. See, *e.g.*, *Welton* v. *Missouri*, 91 U.S. (1 Otto) 275, 280, 281 (1876); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). The same standard of nondiscrimination is applicable to state taxes or fees for the use of public facilities. See *Guy* v. *Baltimore*, 100 U.S. (10 Otto) 434 (1880).

In adherence to this principle, the Court recently has overturned a variety of discriminatory state tax laws. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977). As the Court stated in *Bacchus Imports*, 468 U.S. at 268 n.8, its cases "make clear" that "discrimination between in-state and out-of-state taxpayers" is "offensive to the Commerce Clause."

Numerous state and federal courts have applied this principle to invalidate discriminatory taxes imposed on interstate trucking. See, *e.g.*, *American Trucking Associations, Inc* v. *Conway*, 508 A.2d 405 and 508 A.2d 408 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276 (U.S. July 21 and Aug. 22, 1986); *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623, 627 (Me. 1981); *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. 49 (D. Conn. 1981); *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (N.H. Aug. 12, 1986); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 106 S. Ct. 1997 (1986); *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984).

2. *The Discriminatory Character of the Axle Tax.* In light of this "fundamental . . . antidiscrimination principle" (*Maryland* v. *Louisiana*, 451 U.S. at 754), we take it as indisputable that the Pennsylvania axle tax, if expressly limited to out-of-state trucks, could not stand under the Commerce Clause. The axle tax is, in substance, so limited.

To be sure, viewed on its face and in isolation from the changes to the rest of Pennsylvania's highway tax system that accompanied it, the axle tax does not appear to discriminate against out-of-state trucks; by its terms it applies equally to all trucks of the prescribed weight wherever they may be registered. But there can be no doubt that the legislation creating the axle tax was in fact structured to discriminate against out-of-state trucks. The trial court found (J.S. App. 61a) that

> [t]he registration fee reductions almost always offset [the axle tax] assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. . . . [O]perators of foreign-registered vehicles . . . bear the full brunt of the tax.

The Pennsylvania Supreme Court accepted this finding (*id.* at 9a, 17a) and acknowledged that the "registration

fee reduction almost exactly offsets the $36.00 per axle tax" (*id.* at 30a).

Likewise, appellees conceded in the courts below that "the reduction in Pennsylvania registration fees equaled the amount of the axle tax in most cases, and substantially offset the amount of the axle tax in the other cases" (J.S. App. 15a). Appellees have also conceded in this Court that "[t]he effect of the lowered registration fee was to offset approximately the effect of the Axle Tax for most trucks registered in Pennsylvania" (Mot. to Aff. 7-8). Appellees have further admitted that in adopting these offsetting reductions the State "intended to lessen the burden upon 'local commerce'" (J.S. App. 31a). "Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid [the State's] industry." *Bacchus Imports*, 468 U.S. at 271.

The record accordingly demonstrates—indeed it is uncontroverted—that both the purpose and the effect of the 1982 legislation were to aid local truckers by imposing the burden of the axle tax on out-of-state vehicles. The Commerce Clause plainly prohibits the State from achieving this discrimination directly. See, *e.g.*, *Bacchus Imports*, 468 U.S. at 270, holding that either a "discriminatory purpose" or a "discriminatory effect" is independently sufficient to invalidate a state tax statute. The constitutional protection for interstate commerce cannot be circumvented by the transparent means employed here to reach the same discriminatory end.

This Court has cautioned that "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940). Under this standard, a state may not seek to discriminate "by indirection." *Guy* v. *Baltimore*, 100 U.S. at 443. It is the economic realities of the tax, not the formalities of legislative drafting, that govern for Commerce Clause purposes. See *Complete Auto*, 430 U.S. at 284; *Westinghouse Electric*, 466 U.S. at 405. The constitutionally

required "equality for . . . [interstate] commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

In determining whether a tax discriminates against interstate commerce, therefore, the tax cannot be judged in isolation but rather "must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. at 756. In a number of recent decisions, this Court has found a facially neutral tax to be discriminatory because of exemptions or tax reductions elsewhere in the state code. In *Maryland* v. *Louisiana*, for example, Louisiana imposed a first-use tax on natural gas. "The Act itself, as well as provisions found elsewhere in the state statutes, provided a number of exemptions from and credits for" the first-use tax, including credits on other Louisiana taxes for first-use tax payments (451 U.S. at 732-733). Looking at the related provisions of the State's tax scheme, the Court held that the first-use tax "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions" that "substantially protected [Louisiana consumers] against the impact of the [tax]" (*id.* at 756, 757). See also *Bacchus Imports*, 468 U.S. at 268 (exemption of local liquors from excise tax); *Westinghouse Electric*, 466 U.S. at 404-405 (credit on franchise tax for exports shipped from regular place of business in the state).

This Court's holding in *Maryland* v. *Louisiana* is controlling here. The same enactment that created the Pennsylvania axle tax simultaneously made equal reductions in registration fees for Pennsylvania vehicles subject to the new tax. The effect of this statutory scheme—which the State foresaw and intended, and which appellees and the court below have conceded—was to insulate Pennsylvania-registered trucks from the impact of the axle tax and to impose the entire burden of the tax on

out-of-state trucks. Thus, by its very structure and design, the axle tax discriminates against non-Pennsylvania-registered trucks and is indistinguishable from a tax that by its terms is levied solely against such vehicles.

The Supreme Court of Vermont recently applied this analysis to strike down a highway tax that discriminated in favor of local carriers. In 1982, Vermont enacted a $50 annual fuel user's license fee that was applicable on its face to all trucks. However, the same Act reduced the annual registration fee for Vermont-registered trucks subject to the fuel user's charge by an identical $50. The Vermont Supreme Court held that this tax scheme violated the Commerce Clause. *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412. Explaining that it was "unable to ignore" the obvious effect of the statutory structure, the court ruled that the "challenged provisions of [the Act] discriminate against interstate commerce by providing a direct commercial advantage to Vermont truckers . . . [by] shift[ing] the entire impact of the user fee legislation onto foreign operators" (*ibid.*). The same rationale applies to invalidate the Pennsylvania axle tax.

B. The Discriminatory Axle Tax Cannot Be Justified Under The Compensatory Tax Doctrine.

The court below did not dispute that Pennsylvania, by manipulating registration fees for in-state vehicles, basically confined the impact of the axle tax to out-of-state trucks. Nevertheless, the court upheld the axle tax on the ground that Pennsylvania-registered trucks paid registration fees to Pennsylvania that, even after being reduced to offset the axle tax, were higher than the payments made directly to the State by operators of out-of-state trucks. In the court's view, it was "entirely proper for [the State] to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of [the State's] taxing scheme." J.S. App. 33a.

In so ruling, the Pennsylvania Supreme Court relied on several decisions of this Court applying the so-called "compensatory" or "complementary" tax doctrine. However, the court's reasoning represents a serious misunderstanding of that doctrine. Every other court to consider the issue has concluded that vehicle registration fees are not complementary to other highway use taxes and that a highway use tax that discriminates against interstate commerce cannot be justified by reference to the registration fees paid by in-state carriers. Indeed, appellees themselves have acknowledged this defect in the decision below and now concede (Mot. to Aff. 15-16 & n.4) that the axle tax cannot be sustained under the compensatory tax doctrine.

1. *The Compensatory Tax Doctrine.* In certain narrow and well-defined circumstances, this Court has upheld a tax that discriminated on its face against interstate commerce on the ground that the tax merely "compensated" for an equivalent tax that applied exclusively to in-state taxpayers or transactions. See, *e.g.*, *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). At the same time, the Court has understood that the ban against discrimination would be totally ineffective if a state could defend a tax imposed solely or disproportionately on out-of-state businesses merely by pointing generally in the direction of some other tax or taxes paid only by its domiciliaries. Accordingly, to ensure effective protection of interstate commerce, the Court has strictly limited the scope of the compensatory tax doctrine. For the doctrine to apply, the taxes must be imposed on "substantially equivalent event[s]." *Armco*, 467 U.S. at 643; *Maryland* v. *Louisiana*, 451 U.S. at 759. In other words, each tax must serve a "complementary function" to the other. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

In addition, the taxes, taken together, must result in equal tax burdens. "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce."

Maryland v. *Louisiana*, 451 U.S. at 759. Under this "strict rule of equality" (*Halliburton Oil*, 373 U.S. at 73), even an "indirect" or "slight" disparity is forbidden. *Westinghouse Electric*, 466 U.S. at 397, 405. Thus, under a true compensatory tax, "when the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The . . . sum is the same when the reckoning is closed." *Silas Mason*, 300 U.S. at 584.

To invoke the compensatory tax doctrine, therefore, the state must demonstrate that an apparently discriminatory levy is offset in fact by a specific tax imposed only on in-state businesses for a substantially equivalent event, and that the result is to equalize previously unequal tax burdens. Only such a showing can provide the constitutionally necessary assurance that there is no actual discrimination against interstate commerce. This Court has never uncritically accepted the word of state taxing authorities that there is no inequality in a facially discriminatory levy. On the contrary, the Court has repeatedly rejected attempts by states to justify discriminatory taxes under the compensatory tax doctrine. See *Armco*, 467 U.S. at 642-644; *Westinghouse Electric*, 466 U.S. at 402-406; *Minneapolis Star*, 460 U.S. at 581-582; *Maryland* v. *Louisiana*, 451 U.S. at 758-762; *Boston Stock Exchange*, 429 U.S. at 328-332. Those decisions confirm that the doctrine cannot save Pennsylvania's discriminatory axle tax.

2. *The Inapplicability of the Compensatory Tax Doctrine.* "The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Maryland* v. *Louisiana*, 451 U.S. at 758. Nonetheless, the court below made no attempt to establish that the Pennsylvania registration fee constitutes a tax borne only by in-state trucks and thus imposes a burden for which the axle tax may validly compensate. In fact, *all* trucks operating in Pennsylvania

already satisfy that State's registration fee requirement. Those that are base-registered in Pennsylvania or another IRP state make payments to Pennsylvania; those based in other states satisfy the same requirement by paying their home state's registration fee, pursuant to reciprocity arrangements between Pennsylvania and their state. See J.A. 237.

Moreover, the Pennsylvania Supreme Court failed to recognize that the axle tax and the registration fee do not relate to "substantially equivalent events" (451 U.S. at 759) because they do not serve the same function or purchase the same rights. By virtue of the reciprocity agreements mentioned above, payment of Pennsylvania's registration fee buys the Pennsylvania-based truck the right to operate on the highways of many other states as well; it also (together with other fees and administrative requirements) purchases the privilege of engaging in *intrastate* for-hire carriage in Pennsylvania. In contrast, payment of the axle tax buys the non-Pennsylvania-based truck no more than the right to use Pennsylvania's highways, and even there only to transport *interstate* shipments.

Because they purchase fundamentally different rights, the Pennsylvania registration fee and the Pennsylvania axle tax cannot be considered "compensatory" taxes. See J.S. App. 44a-45a (Nix, C.J., dissenting). This is precisely why the Supreme Courts of Vermont, New Hampshire, and Maine have rejected the contention that registration fees may be held to complement or compensate for otherwise discriminatory highway use charges. As the Supreme Judicial Court of Maine explained in *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d at 626-627:

> When an owner or operator of a Maine-based truck pays his registration fee, he purchases the right to operate in any of 46 states; the [challenged] highway use fee . . . , by contrast, buys for the foreign-based truck only the right to use Maine roads. In a

> practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

See also *Private Truck Council of America, Inc.* v. *New Hampshire*, slip op. 4; *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 407-408, 412-413.

Furthermore, even if registration fees could in appropriate circumstances be considered complementary to highway use taxes, the requisites of "equivalen[ce]" (*Maryland* v. *Louisiana*, 451 U.S. at 759) and "strict . . . equality" (*Halliburton Oil*, 373 U.S. at 73) are wholly lacking here. The mere fact that registration fees are substantially higher than the axle tax, upon which the court below placed great weight (J.S. App. 33a), does not satisfy the requirements of the compensatory tax doctrine. See *Armco*, 467 U.S. at 642-643 (holding that a much larger manufacturing tax was not complementary to a wholesaling tax); *Minneapolis Star*, 460 U.S. at 581-582 (holding that Minnesota's valid general sales tax, though considerably greater, was not complementary to a paper and ink tax that discriminated in violation of the First Amendment). Rather, as discussed above, the difference in the amounts of the Pennsylvania registration fee and axle tax reflects the different rights acquired by payment of each charge. See page 23, *supra*.

More important, the Pennsylvania Supreme Court could point to nothing in the text or history of the axle tax legislation to indicate that it was designed to redress an existing imbalance in tax burdens or that it would result in equality of tax treatment for in-state and out-of-state truckers. As Chief Justice Nix noted in dissent (J.S. App. 41a-42a), "there is nothing in the statute itself or in the circumstances surrounding the enactment of Act

234 which adds legitimacy to [the State's] position that it was designed to restructure the tax burden upon the trucking industry in this Commonwealth." The record is barren of *any* analysis showing that the legislature believed that non-Pennsylvania-registered trucks were in fact bearing less than their fair share of highway costs under the prior tax system. Nor does it reflect *any* consideration of the structure and size of the adjustment that might be needed to equalize the tax burdens.[8] The compensatory tax doctrine cannot be applied in such a legislative vacuum. See *Armco*, 467 U.S. at 643 ("[m]anufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales").

This Court has recognized that taxes that "are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause . . . must receive the careful scrutiny of the courts." *Complete Auto*, 430 U.S. at 288-289 n.15. Exacting review is especially necessary for purportedly "compensatory" taxes, which by definition discriminate on their face against interstate commerce and thus threaten a paramount policy of the Constitution. To permit state courts to rationalize discrimination against interstate commerce on an unsupported *post hoc* basis, as the Pennsylvania

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[8] In fact, there is convincing evidence that the axle tax was *not* designed as a "compensatory" tax. Registration fees were not reduced across the board for Pennsylvania-based trucks, which should have been done if the reduction that was made truly reflected a determination that local commerce was burdened with an excessive share of highway costs. Rather, fees were reduced only for vehicles weighing more than 26,000 pounds—*the very same group to which the new axle tax was being applied.* The anomalous result of this purported "rational restructuring" was that, although registration fees ordinarily increase with truck weight, the $270 registration fee for Class 8 vehicles (21,000-26,000 pounds) is higher than the $243 fee for Class 9 vehicles (26,001-30,000 pounds). 75 Pa. Cons. Stat. Ann. § 1916(a) (J.S. App. 87a).

Supreme Court did here, would open the way to ready evasion of the Commerce Clause's prohibition.[9]

3. *Pennsylvania's Tax Redistribution Argument.* In this Court, appellees have acknowledged that Pennsylvania's axle tax and registration fees are *not* compensatory, have disavowed any argument under the compensatory tax doctrine, and have conceded that the Pennsylvania Supreme Court's reliance on that doctrine was "erroneous." See Mot. to Aff. 15-16 & n.4. As the foregoing discussion makes clear, appellees' concessions are compelled by this Court's recent decisions.

Having cast aside the compensatory tax doctrine, appellees seek to defend the axle tax on the theory that the offsetting reductions in the registration fees for Pennsylvania-based vehicles merely accomplished a redistribution of a tax burden that had previously fallen too heavily on local motor carriers. See Mot. to Aff. 10-14. This argument—which represents a diluted version of the compensatory tax argument—founders on two grounds.

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[9] The cases cited by the Pennsylvania Supreme Court (J.S. App. 33a-34a) lend no support to its decision. In *Halliburton Oil, supra,* this Court in fact struck down a discriminatory state tax, finding that it was not saved by the compensatory tax doctrine because its unequal treatment of in-state and out-of-state taxpayers violated the doctrine's "strict rule of equality" (373 U.S. at 73). In *Henneford* v. *Silas Mason Co., supra,* the Court upheld the paradigm of compensatory taxes—state sales and use taxes—but only after determining, based on a careful examination of the state tax structure, that "[e]quality is the theme that runs through all the sections of the statute" (300 U.S. at 583) and that the burden imposed under one tax was "balanced by an equal burden" under the other (*id.* at 584). *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), turned on the fact, as the Court recognized in *Armco* (467 U.S. at 643 n.6), that the taxes at issue were imposed on entirely different businesses and therefore were not discriminatory; in contrast to *Arctic Maid* and as in *Armco,* there can be no doubt that Pennsylvania-registered and non-Pennsylvania-registered trucks "operate in precisely the same business" (467 U.S. at 643 n.6).

To begin with, as previously explained, there is nothing in the legislative record to indicate that the Pennsylvania legislature was in fact attempting to restructure the tax system in order to relieve a disproportionate tax burden on local commerce. Indeed, beyond appellees' bald assertion, there is simply no evidence to support the factual premises of their argument—that an imbalance existed in the prior tax system and that the amount of the axle tax was calculated to redress any such imbalance. This absence of proof itself is sufficient to require rejection of the State's contention. See *Westinghouse Electric*, 466 U.S. at 405-406, striking down a discriminatory tax despite the state's generalized assertion that it offset a "relatively high franchise tax" imposed on local business firms and was reasonable "when viewed in terms of the whole New York tax scheme."

In addition, by eschewing the compensatory tax doctrine, appellees have abandoned the only legal standard that, as the court below realized (J.S. App. 33a-34a), could serve to sustain a discriminatory levy like the axle tax. The compensatory tax doctrine was devised to address precisely the issue that appellees claim is involved in this case: whether a tax that discriminates against interstate commerce can be justified as necessary to redress a prior disproportionate tax burden on intrastate or locally based commerce. See, *e.g.*, *Boston Stock Exchange*, 429 U.S. at 323 (applying the compensatory tax doctrine to evaluate a discriminatory tax enacted because of "concern[]" that the pre-existing "tax created a competitive disadvantage" for in-state transactions).

Apparently recognizing that they are unable to satisfy any of the requirements laid down by this Court under the compensatory tax doctrine, appellees now attempt to resort to an amorphous approach that rests on unsubstantiated assertions and *post hoc* rationalizations. In so doing, appellees have cut themselves adrift from any arguable basis for upholding the axle tax and have virtually confessed the infirmity of the tax under this Court's decisions.

II. THE PENNSYLVANIA MARKER FEE AND AXLE TAX VIOLATE THE COMMERCE CLAUSE BECAUSE THEY IMPOSE A HIGHER EFFECTIVE TAX RATE ON OUT-OF-STATE TRUCKS.

The previous discussion demonstrates that Pennsylvania's tax system is structured to place the cost of the axle tax on vehicles registered outside the State. But wholly apart from that flaw, the Pennsylvania highway tax system suffers from another failing: both the axle tax and the marker fee discriminate against interstate commerce because they operate to impose an effective tax rate, in terms of cost per mile, that is many times higher for the typical truck registered outside Pennsylvania than for a comparable truck registered in the State. Since 1980, six other states have adopted highway taxes having these characteristics, with a predictably burdensome impact on interstate commerce. If all states were to do so, the consequences would be devastating.

A. The Commerce Clause Prohibits A State Tax That In Practical Effect Discriminates Against Out-Of-State Taxpayers And Is Not Fairly Related To Services Provided By The State.

The Constitution enjoins "discrimination against interstate commerce, whatever its form or method." *South Carolina State Hwy. Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 185 (1938). Under well-settled principles, the Commerce Clause condemns a state statute that, although facially neutral, is discriminatory in effect. Rather than looking only to the statutory provision on its face, this Court has "determine[d] whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). Thus, "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980).

In line with these principles, the Court has repeatedly invalidated state tax statutes that discriminated against interstate commerce by operating in a manner that favored in-state over out-of-state companies. As early as *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887), the Court struck down a flat tax that, while facially neutral, had a discriminatory impact on out-of-state businesses. There, the Court held unconstitutional a so-called "drummer's tax" on persons who engaged in the sale of goods in Memphis without having a fixed place of business in the city. The Court pointed out that the tax was "discriminative against the merchants and manufacturers of other states" (*id.* at 498) and that "[t]his kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition" (*ibid.*).

Likewise, in *Sprout* v. *South Bend*, 277 U.S. 163 (1928), the Court overturned a city licensing fee for buses, again recognizing that a facially neutral tax worked to discriminate against out-of-state companies because the tax was "the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily" (277 U.S. at 170). In *Best & Co.* v. *Maxwell*, *supra*, the Court struck down a facially neutral privilege tax on itinerant sellers, holding that the tax was unconstitutionally discriminatory because it fell with a disproportionately heavy impact on out-of-state businesses and necessarily had no relation to such companies' actual activities in the state (311 U.S. at 456-457).

Finally, in *Nippert* v. *Richmond*, 327 U.S. 416 (1946), the Court adhered to this "long line" of decisions (*id.* at 417-418) by invalidating a flat tax on solicitors as discriminating against out-of-state merchants. The Court observed that "a single act of . . . solicitation would bring the [flat tax] into play" and that the tax "inherently bore no relation to the volume of business done or of returns from it" (*id.* at 427). In addition, the Court took note of the "common knowledge" that tax statutes

that discriminate against out-of-state businesses are "often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation" (*id.* at 434).[10]

The itinerant merchants who were the victims of the discriminatory taxes invalidated in *Robbins*, *Best & Co.*, and *Nippert* were in precisely the same predicament as the interstate truckers taking the instant appeal. Because they were not based in the taxing jurisdiction, they were likely to conduct less of their business there and accordingly to find each transaction more heavily taxed than the same transaction engaged in by their competitors based in the taxing jurisdiction. Thus, the Pennsylvania axle tax and marker fee, like the drummer tax, "in . . . practical operation [are] capable of use . . . to place the merchant . . . doing business interstate at a disadvantage in competition with . . . [businesses] within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 56 (1940).

This Court's most recent decisions have distilled these controlling Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279, the Court held that a state tax is valid under the Commerce Clause only if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The Court has reiterated this standard in virtually every subsequent case challenging a state tax under the Commerce Clause. See, *e.g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 617, 625-626 (1981); *Maryland* v. *Louisiana*, 451 U.S. at 754.

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[10] The Court has cited *Nippert* with approval in recent opinions. See, *e.g.*, *Westinghouse Electric*, 466 U.S. at 402-403; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615, 626, 629 (1981); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 37; *Boston Stock Exchange*, 429 U.S. at 329.

The third prong of the *Complete Auto* test—nondiscrimination—protects interstate commerce by ensuring that it is not subjected to unfavorable treatment by the state. The fourth prong—proportionality—was explained in *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original):

> [This] prong . . . imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact [with the state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of [the] state tax burden."

See also *Armco*, 467 U.S. at 643 n.6 (the "fairly related" prong of *Complete Auto* recognizes that "an in-state [taxpayer] normally benefits to a greater extent from services provided by the State than does a transient [taxpayer]"); *Commonwealth Edison*, 453 U.S. at 645 & n.10 (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State").[11]

Complete Auto and the earlier rulings that it synthesized unquestionably prohibit a state tax that, by failing to account for out-of-state companies' lesser presence in the state, operates to impose a greater tax burden on those companies than on in-state firms. In particular, a tax that, although facially neutral, results in a disproportionate burden on out-of-state businesses due to their more limited presence in the state is both discriminatory in effect and not fairly related to the services provided by the state. See L. Tribe, *American Constitutional Law* 356 (1978) (the Commerce Clause prohibits as "uncon-

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[11] As this Court recognized in discussing a different kind of tax, "[b]y its very nature an *unapportioned* gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 663 (1948) (emphasis added).

stitutionally discriminatory . . . state taxes non-discriminatory on their face which, without sufficient justification, impose economic burdens on interstate enterprises which are not in fact imposed on local competitors").

B. The Marker Fee And The Axle Tax Operate To Discriminate Against Out-Of-State Trucks By Subjecting Them To Higher Average Per-Mile Tax Costs.

Under the foregoing decisions of this Court, the Pennsylvania axle tax and marker fee cannot stand. The record in this case demonstrates that these two taxes are precisely the sort of discriminatory levies that the Commerce Clause forbids.

The axle tax and the marker fee both serve to raise revenue to defray the costs of maintaining Pennsylvania's highways, which are used by motor vehicles registered in Pennsylvania and in other states. It is undisputed that the amount of wear and tear caused by any particular vehicle varies directly with the number of miles it is driven and that, for any given amount of driving, the wear and tear caused by a vehicle is the same regardless of the state in which it is registered. The State's own experts so testified. J.A. 78, 82.

Accordingly, a rational highway "use" tax should be designed to vary with the extent of the taxpayer's use of the highways. This was not done, however, in the case of the marker fee, and it was done only to a limited extent in the case of the axle tax. The $25 marker fee had to be paid for a vehicle whether it traveled one mile on Pennsylvania's highways or 100,000 miles. The axle tax is fixed at $180 for five-axle trucks (most of the trucks subject to the tax have five axles), except that it is apportioned for the first 2,000 miles of operation at a rate of 9¢ per mile for such trucks. See note 2, *supra*. No matter how many miles in excess of 2,000 a truck drives on Pennsylvania's highways, and no matter how much wear and tear it thereby causes, it pays no additional axle tax.

The Court should not be surprised to learn that the non-proportional character of these Pennsylvania taxes is highly advantageous to trucks registered in Pennsylvania and disadvantageous to those registered elsewhere. A survey conducted by ATA and admitted in evidence in the marker fee case showed that the average Pennsylvania-based truck drove approximately 23,000 miles annually in the State, compared to about 4,500 miles for trucks based outside Pennsylvania. As a consequence, the per-mile cost of the marker fee averaged five times as much for vehicles registered outside Pennsylvania as for those registered in it. See J.A. 72, 76, 99, 101, 104, 105. There is no reason to assume that the same disparity would not exist with respect to the axle tax. This confirms the blatant discrimination that is "inherent" in flat taxes. *Best & Co.*, 311 U.S. at 455-456 n.3.

The State has contested the admissibility and reliability of ATA's survey,[12] but the basic finding of the survey—that a typical truck registered in Pennsylvania drives many more miles on Pennsylvania's highways than trucks registered in other states and therefore enjoys substantially lower per-mile marker fee and axle tax costs—is confirmed both by common sense and by the State's own data and submissions. For example:

• There were about 131,000 vehicles registered in Pennsylvania in 1981 whose owners were deemed to have paid Pennsylvania the marker fee, compared to 399,000 out-of-state vehicles for which markers were purchased in that period. J.A. 74, 89, 104. Although Pennsylvania-registered trucks thus constituted less than 25% of the total, they were responsible for approximately 65% of the miles driven on Pennsylvania's highways by trucks

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[12] The State's objections to the survey were repeatedly overruled by the trial court (see J.A. 65, 78, 84), which characterized the survey as "certainly relevant and material, and certainly hav[ing] a lot of probative value" (J.A. 67). The Pennsylvania Supreme Court did not overturn those evidentiary rulings, and it accepted the results of the survey for purposes of its decision.

weighing over 17,000 pounds. J.A. 85 (excluding 2-axle, 4-tire trucks).

• One of the State's exhibits in the axle tax case showed that Pennsylvania-based trucks drive 39.2% of their miles in Pennsylvania, compared to only 7.6% of total miles in Pennsylvania for trucks registered in other states. J.A. 170-171.[13] These state supplied data indicate a disparity even higher than the five-to-one ratio shown in the ATA survey.

• Various other exhibits submitted by the State in the axle tax case confirm that even vehicles engaged substantially in interstate commerce drive far more miles in their home states than they possibly could in any other state. Thus, one exhibit showed that vehicles registered in Pennsylvania and the surrounding states (excluding Delaware, which is atypical because of its size) averaged between 41% and 51% of their total miles in their state of registration (J.A. 186), while another exhibit reported that a group of Pennsylvania-based vehicles large enough to be subject to the axle tax drove 44.7% of their miles in Pennsylvania and no more than 8.8% in any other state (J.A. 199).

• Perhaps most telling is the fact that although trucks registered in Pennsylvania were responsible for somewhere between 45% and 65% of all miles driven on Pennsylvania's highways by trucks subject to the axle tax (*i.e.*, weighing over 26,000 pounds) (compare J.A. 195 with J.A. 99, 101), appellee Scheiner's affidavit admits (J.A. 207) that these vehicles accounted for less than 16% of total axle tax revenues.[14]

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[13] These figures do not take into account the large number of Pennsylvania-registered trucks that drive 90% or more of their miles within the State and therefore do not file fuel use tax reports. When all Pennsylvania-registered trucks over 17,000 pounds are included in the total, the proportion of Pennsylvania miles to total miles driven by such trucks increases from 39.2% to 60%. J.A. 200.

[14] This characteristic of taxes not proportioned to mileage is not unique to Pennsylvania. As explained in the Jurisdictional State-

C. The Adoption By Numerous States Of Taxes Like Pennsylvania's Would Impose A Crippling Cumulative Burden On Interstate Motor Carriers.

While the interstate trucking industry stands ready and willing to shoulder its fair share of the tax burden relating to the construction and upkeep of Pennsylvania's highways, the foregoing figures demonstrate beyond cavil that the marker fee and axle tax work egregious discrimination against businesses located outside the State. What is more, if Pennsylvania may lawfully impose this kind of tax, there can be no constitutional impediment to other states' doing the same, like 50 separate principalities each advancing the parochial interests of its inhabitants at the expense of "foreigners." See *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). The cumulative consequences of such a regime of taxation would cripple interstate commerce and nullify the fundamental objective of the Commerce Clause—to form an economic union in which no material advantage or detriment attaches to the election to engage in interstate rather than local commerce. See J.S. App. 45a (Nix, C.J., dissenting).

The adverse impact on interstate commerce is vividly illustrated by examining the consequences if every state were to impose an axle tax like Pennsylvania's.[15] Consider two carriers that each operate 100 five-axle trucks of the same weight over the same distance, *e.g.*, 96,000

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ment in *American Trucking Associations, Inc.* v. *Gray*, appeal pending, No. 86-358 (U.S. Sept. 3, 1986), at 2-4, 15-17, Arkansas' highway use equalization tax of $175 per year also produces dramatically lower per-mile costs for trucks registered in Arkansas than for trucks based in other states.

[15] At present, seven states have highway use taxes that are flat (like the marker fee) or not proportioned to highway use (like the axle tax). See 86-358 J.S. 7-8 & n.3 (challenging Arkansas' HUE tax). If the Court sustains the taxes at issue in this case despite their discriminatory effect, further proliferation of such taxes would thereby be encouraged. The fold-out table printed as Appendix K to the Jurisdictional Statement graphically demonstrates the spread of discriminatory state highway taxes.

miles per year for each truck. If one carrier were to operate exclusively within a single state, it would pay a tax of $18,000 to that state ($180 x 100), or a bit less than two-tenths of a cent per mile of operation. If the second carrier were to distribute its operations equally in all 48 of the continental United States, so that each truck drove 2,000 miles per year in each state, that carrier would cause no more wear and tear to the highways but would have to pay $864,000 for the same miles of operation ($180 x 100 x 48), or nine cents per mile.

In the real world, of course, the disparities are not so extreme; but the record shows that trucking companies often do business in all 48 states (J.A. 57) and that replication of flat taxes in each state in which an interstate carrier operates could be disastrous to its financial viability. For instance, it was stipulated in the marker fee case that if each state in which appellant Old Dominion Freight Line operated were to impose a marker fee like Pennsylvania's, the cost to Old Dominion of qualifying all its vehicles to operate throughout its system in 1981 would have been about $350,000, approximately seven times its net pre-tax income for the year. J.A. 28. And the cumulative impact of the far larger axle tax would be many times greater. The Commerce Clause prohibits states from forcing businesses to shoulder such a staggering tax burden solely because they elect to transact business in many states rather than just one or two. See *Nippert*, 327 U.S. at 434.

Pennsylvania itself has recognized the potential of flat highway taxes to create serious burdens of this type.[16] A

[16] Representative Wenger, an opponent of the marker fee, warned of the unfairness of such a tax and the hardships it would cause even for relatively modest levels of interstate activity (J.A. 114-115):

> We can see that if neighboring states pass similar legislation in retaliation, for instance, you could have a farmer with a farm truck, one truck, that is used only seasonally, and he might take his produce, his apples, or his peaches[,] into New York to sell them. He would have to buy a sticker there. He might go into the State of Maryland to buy fertilizer

report prepared in 1983 by the Pennsylvania General Assembly's Legislative Budget and Finance Committee evaluated the axle tax after it had been in effect for about a year.[17] One of the concerns expressed in the report related to the actual or impending adoption by ten states of retaliatory taxes to be imposed on Pennsylvania-registered trucks. Although Pennsylvania's axle tax costs no more than $180 per truck, the report pointed out (Section I, page 2) that "[i]f and when the retaliatory tax becomes effective in all ten such states, the potential additional cost to a Pennsylvania-based truck that travels through these states is $1,675 per year."

D. Pennsylvania's Discriminatory Highway Taxes Have Provoked Economic Retaliation By Other States.

Within three months of the effective date of Pennsylvania's axle tax, its neighbor New Jersey had adopted a resolution that not only condemned the tax as discriminatory (see pages 15-16, *supra*), but urged other states "to adopt retaliatory measures against the Commonwealth of Pennsylvania in regard to this inequitable tax" (App., *infra*, 1a). This tellingly demonstrates the propensity of discriminatory taxes to generate the kind of trade war among the states that the Commerce Clause was meant to prevent.

Over the past seven years, six states in addition to Pennsylvania (Arkansas, Indiana, Kentucky, Maryland, New Jersey, and Vermont) have granted preferential

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several times a year. He would have to buy a sticker there. He might go into New Jersey once a year to buy chemicals. He would have to buy a sticker there. You end up penalizing a truck that is used very little and already is paying a license fee in proportion considerably more per miles traveled and per pounds hauled than anyone else, and he is going to end up paying perhaps several hundred dollars in fees to other states.

[17] The report is entitled *The Pennsylvania Axle Tax For Highway Bridge Improvement (Act 234 Of 1982): A Report On Its Collection And Economic Impact On The Pennsylvania Trucking Industry*. A copy has been lodged with the Clerk of this Court.

treatment to local trucks by adopting some form of flat highway tax. See 86-358 J.S. 7-8 & n.3. In response, numerous other states (Florida, Georgia, Maine, Nebraska, New Hampshire, New Jersey, Oklahoma, and Vermont) have adopted or activated mirror-image retaliatory taxes that apply only to trucks registered in states such as Pennsylvania that have taxes the retaliating states find objectionable. See J.S. App. K. Such retaliatory taxes have no impact on wholly intrastate operators, who are among the principal beneficiaries of flat taxes. Nevertheless, as the Pennsylvania legislative committee noted (see page 37, *supra*), retaliatory taxes can inflict severe cumulative punishment on interstate motor carriers that base their trucks in flat tax states.

The chain of events between the neighboring states of Arkansas and Oklahoma is illustrative of the compound discrimination provoked by flat highway taxes. See Brief of State of Oklahoma as Amicus Curiae, at 17-19. Following enactment of the Arkansas highway use equalization tax (5¢ per mile up to a ceiling of $175 per year), the Oklahoma Tax Commission, directed by the state legislature, reviewed the Arkansas tax and found that it placed Oklahoma-based truckers at a competitive disadvantage. The Commission therefore activated Oklahoma's retaliatory highway taxes—Okla. Stat. Ann. tit. 47 § 1120(K) (West Supp. 1985)—thereby imposing a $175 or 5¢ per mile tax on Arkansas-based trucks operating in Oklahoma. See 86-358 J.S. 20. (Oklahoma has also retaliated against Pennsylvania's axle tax.) The discrimination inherent in the Arkansas tax has thus been multiplied and redirected at trucks based in that state, exacerbating the overall burden on interstate commerce.

To compound the problem, Arkansas has responded to the retaliation by Oklahoma and others of its sister states by enacting legislation that shields Arkansas trucks from those taxes. Arkansas has determined to reimburse Arkansas-registered trucks for the highway taxes that other jurisdictions impose on them because of the dis-

criminatory tax that Arkansas itself imposes. See Ark. Stat. Ann. §§ 75-817.4, 75-817.5 (Supp. 1985) (reproduced at 86-358 J.S. App. 41a).

The unseemly economic conflict among the states provoked by Pennsylvania's axle tax and Arkansas' HUE tax—involving local preferences, retaliatory enactments, and protectionist countermeasures—is wholly incompatible with the fundamental purpose of the Commerce Clause. Furthermore, the added cost to interstate trucking that results from these new levies represents a substantial financial burden and stands as an obstacle to the free flow of commerce that the Constitution commands. "[T]his is the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert*, 327 U.S. at 434.

E. Existing Mileage-Related Taxes Provide A Practical, Non-Discriminatory Alternative To The Axle Tax And Marker Fee.

The evils caused by the marker fee and the axle tax are entirely avoidable, because a discriminatory tax is unnecessary to achieve the State's legitimate interest in reimbursement for the cost of maintaining its highways. Rather, a mileage-related fuel tax is a readily available alternative that can fully compensate the State, while at the same time being proportional to each truck's use of the highways and therefore entailing no discrimination against interstate commerce. Every state, including Pennsylvania, employs a mileage-related fuel tax.[18] As

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[18] See 72 Pa. Cons. Stat. Ann. §§ 2611a-2611z (Tax on Liquid Fuels); 2614.1-2614.24 (Fuel Use Tax); 2617.1-2617.26 (Motor Carriers Road Tax). See also U.S. Dep't of Transportation, Federal Highway Admin., *Highway Taxes and Fees, How They are Collected and Distributed, 1984*, at 7-9, Table MF-104. These taxes were described by the Supreme Court of Pennsylvania (J.S. App. 3a) as "related to and dependent upon a motor carrier vehicle's actual use of Pennsylvania highways," because the more miles a truck is driven in Pennsylvania, the more gallons of fuel it consumes and the greater the fuel tax it pays. See *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. at 56.

Oklahoma states in its *amicus curiae* brief in this case (at 9), "Oklahoma's own successful reliance on apportioned/reciprocal truck registration fees and mileage-related motor fuel taxes shows that non-discriminatory forms of state highway taxation are readily available."

A highway use tax imposed on the basis of mileage, such as the existing Pennsylvania fuel sales and use taxes, is the fairest and most economically efficient form of highway tax, directly tying the amount of the tax to the amount of wear and tear to the highways. Especially since an increase in Pennsylvania's fuel taxes would both fully serve the State's interest in highway maintenance and completely eliminate the present discrimination against out-of-state trucks, the Pennsylvania axle tax and marker fee violate the Commerce Clause. It is evident that "the local interest" in raising tax revenues "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Hughes* v. *Oklahoma*, 441 U.S. at 336; *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769, 778-779 (N.J. 1986), petitions for cert. filed, Nos. 86-843 and 86-879 (U.S. Nov. 24 and Nov. 26, 1986).[19]

F. The *Aero Mayflower* Line Of Cases, Upon Which The Pennsylvania Supreme Court Relied, Does Not Sustain The Axle Tax And Marker Fee.

The Pennsylvania Supreme Court did not dispute the evidence that compellingly demonstrates that the axle tax and marker fee operate to discriminate against out-of-

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[19] This is not to suggest that a highway use tax must be precisely calibrated to take account of every conceivable variable that may bear on road maintenance and repair. Some factors may be too insignificant to have an appreciable effect on highway depreciation, or too small in relation to the administrative costs of implementation, to justify their inclusion in the tax methodology. See *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 552-553 (1950) (Frankfurter, J., dissenting). But these considerations cannot justify discrimination that, as in this case, is both egregious and avoidable through practical alternatives.

state trucks and are not fairly related to the highway facilities and services provided by the State. Rather, it deemed those facts to be "inconsequential" to its Commerce Clause analysis (J.S. App. 28a). In holding that the taxes satisfied the *Complete Auto* test, the court relied exclusively on this Court's *Aero Mayflower* line of cases, which predated *Complete Auto* by several decades. Those cases do not sustain the validity of the axle tax and marker fee, however, and in any event can no longer be regarded as controlling.

1. *The Aero Mayflower Rationale.* In cases decided between 1935 and 1950, this Court upheld state highway taxes against the argument that the taxes violated the Commerce Clause because they were not graduated according to a vehicle's use of the roads in the state. See *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The *Aero Mayflower* line of decisions reiterated the settled principle that a state tax may not operate to discriminate against interstate commerce. See 295 U.S. at 289; 332 U.S. at 501, 503; 339 U.S. at 544. Moreover, it did not take issue with the general proposition—recognized in cases such as *Robbins* and *Nippert*—that a facially neutral tax may in fact have a disparate impact on out-of-state taxpayers, who have a lesser presence in the state than their in-state competitors.

Nevertheless, the *Aero Mayflower* line of cases upheld flat highway taxes, rejecting the claim that they impermissibly discriminated against out-of-state carriers engaged in interstate commerce. The Court reasoned in those cases that (1) a tax precisely calibrated to the wear and tear caused to the highways by a particular vehicle would not be administratively feasible; (2) the taxes at issue were imposed for the privilege of using the highways rather than for their actual use, and out-of-state vehicles could not complain if they failed to avail themselves of the opportunity to use the roads as much

as in-state vehicles; and (3) the taxes at issue were not burdensome to interstate carriers. See 295 U.S. at 289; 332 U.S. at 503-504, 506 n.19; 339 U.S. at 544, 546-547.

2. *Subsequent Legal and Operational Changes.* The rationales employed half a century ago in deciding the *Aero Mayflower* group of cases cannot withstand analysis today. First, and most important, the Court's concern about the feasibility of administering graduated highway taxes, which was critical to its decisions upholding the flat taxes, no longer applies. See *Nippert*, 327 U.S. at 424-425, 427-428. In this heavily computerized age, all states, including Pennsylvania, utilize a variety of mileage-related highway taxes. See pages 39-40, *supra*. Whatever may have been the situation a half-century ago, it is too late in the day for the discrimination inherent in a tax such as the axle tax or marker fee to be justified by a state's reflexively asserting, or a court's uncritically accepting, a claim of administrative convenience. See *Minneapolis Star*, 460 U.S. at 587; *Halliburton Oil*, 373 U.S. at 74 n.9.

Second, the "privilege tax" rationale of the *Aero Mayflower* line of cases has no continuing validity. The Court has now recognized that a tax is no less discriminatory merely because it is labeled a "privilege" tax rather than a "use" tax. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. This Court's recent decisions have moved away from such empty fictions, which serve "only as a rule of draftsmanship" (*id.* at 285), and instead look to the "economic realities" (*id.* at 284) of the challenged tax. See *Westinghouse Electric*, 466 U.S. at 405; *Commonwealth Edison*, 453 U.S. at 614-617.[20]

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[20] In the *Aero Mayflower* era, Commerce Clause analysis was dominated by labels, especially in connection with the taxation of interstate transportation companies. This preoccupation produced anomalous results, including *Aero Mayflower* itself. For instance,

Third, the dramatic changes in the trucking industry that have occurred in the 50 years since the decision in *Aero Mayflower* have greatly exacerbated the burden that flat highway taxes impose upon interstate commerce. Pennsylvania's own expert acknowledged these sweeping changes in his affidavit in this case (J.A. 190):

> Many years ago, the industry was characterized by many small carriers operating within one state or one small region. The steady, long-term trend has been toward larger national carriers which operate in many states.

This description is fully substantiated by the historical evidence.

During the first third of this century, trucks were engaged principally in local rather than interstate service. See C. Taff, *Commercial Motor Transportation* 8-9 (7th ed. 1986); Rosenbaum & Lillienthal, *Motor Carrier Regulation: Federal, State and Municipal*, 26 Colum. L. Rev. 954, 972-973 & n.54 (1926). In 1927, about three-quarters of all truck trips were less than 30 miles long, and a very small proportion of trips exceeded 60 miles. National Automobile Chamber of Commerce, *Truck Facts for 1927*, at 7, 15, 21, 48. Out-of-state trucks accounted for only 2% to 10% of the total truck traffic, and many of these trucks were based near the state line and were engaged in local service. *Id.* at 7, 21-23. Moreover, most trucking operations involved individual vehicles or small fleets of trucks; in 1927 fewer than 10,000 fleets had 10 or more trucks (*id.* at 13), and in 1935 there were only 4,000 fleets of 25 trucks or more, comprising a total of

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in *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 188-189 (1931), a state tax based on motor carriers' carrying capacity was struck down as a tax on the "privilege" of engaging in interstate commerce because the legislature had not expressly tied the tax to highways. Only two years later, in *Hicklin* v. *Coney*, 290 U.S. 169, 173 (1933), a substantially identical state tax based on carrying capacity was upheld as a valid highway "use" tax because the tax statute expressly allocated the proceeds to highway maintenance.

505,000 trucks. Automobile Manufacturers Ass'n, *Motor Truck Facts* 17 (1935 ed.).

Today, in contrast, thanks in part to the vast, modern interstate highway system, many large fleets of trucks are engaged in extensive interstate service. The average length of haul has risen to 645 miles and is even longer for heavier trucks. C. Taff, *supra*, at 158. By 1984, trucks accounted for over 600 billion ton-miles of service, up from 20 billion ton-miles in 1935. See *id.* at 9, 12; *Motor Truck Facts*, *supra*, at 28. In providing such service, out-of-state trucks constitute a major share of truck traffic in a state; for example, non-Pennsylvania-based carriers compiled between 35% and 55% of the overall truck mileage in Pennsylvania (see J.A. 99, 101, 195) (while making about 85% of total axle tax payments). Furthermore, in 1985 there were 77,000 fleets of 10 or more vehicles operating 7.9 million trucks; more than 4,400 fleets had 500 or more trucks, amounting to a total of 4.6 million trucks. *Chilton's Commercial Carrier Journal* (July 1986).

Likewise, truck taxes have greatly escalated in the past 50 years. In 1927, the average truck paid $52 in state registration fees and highway taxes (exclusive of property taxes), and trucks paid a national total of $151 million in fees and taxes; in 1935 the average state charge was $81 per truck, and the total of such nationwide payments was $262 million. Automobile Manufacturers Ass'n, *Automobile Facts and Figures* 36 (1936 ed.). By 1982, the average tax had risen to $1,283 for a three-axle tractor and semitrailer and $2,829 for a five-axle tractor and semitrailer. U.S. Dep't of Transportation, Federal Highway Admin., *Road User and Property Taxes on Selected Motor Vehicles* 16 (1982). In 1984, trucks paid a total of $8.7 billion in state registration fees and highway taxes (exclusive of personal property taxes). U.S. Dep't of Transportation, Research and Special Programs Admin., *National Transportation Statistics—Annual Report, 1986*, at 29.

Thus, in the modern world of high-volume, heavily-taxed, multi-state motor carrier operations, the adverse impact on interstate commerce of non-proportional or flat highway taxes entails a level of discrimination and injury qualitatively different from that which existed during the years when *Aero Mayflower* and its progeny were decided. The same result can no longer be justified.

The nature of modern interstate trucking operations also belies the Court's assertion in *Aero Mayflower* that the disproportionate impact of a flat tax on an out-of-state trucker results from "his own refusal to enjoy [the privilege of using the state highways] as freely as he may" (295 U.S. at 289). In light of the vast distances now traveled by interstate trucks and the commercial complexity of scheduling nationwide transportation services, it simply defies reality to assert that an out-of-state company "refus[es]" to have its trucks make the same use of a state's highways as in-state trucks do. The *Aero Mayflower* reasoning founders on the fact that an interstate truck cannot be in more than one state at a time, and its route is governed by the demands of its shippers. (J.A. 57). In addition, as an increasing number of states adopt flat highway taxes, each certainly cannot justify its levy on the theory that trucks should spend more time in that state and less in others. These points, made in the dissent of Justices Frankfurter and Jackson in *Capitol Greyhound*, 339 U.S. at 557, take on added force in view of current conditions in the trucking industry, which serve to magnify the adverse cumulative impact of flat taxes.

3. *Academic Criticism of Aero Mayflower.* The *Aero Mayflower* rationale has long been subject to sharp academic criticism. Even before the Court's decision in *Aero Mayflower*, Professor Paul Kauper pointed out that flat highway taxes impose a disproportionate burden on interstate carriers, which cannot be justified "on the theory that the highways of the State are *available* for their use, and that they can be assessed on the basis of *potential* rather than actual use." Kauper, *State Taxation of*

Interstate Motor Carriers, 32 Mich. L. Rev. 171, 203, 207 n.34 (1933) (emphasis in original). Accordingly, Professor Kauper concluded that highway taxes must "take account of the actual use made of the highways" (*id.* at 211). Similarly, Professor Lockhart disapproved of the *Aero Mayflower* analysis, noting "the disproportionate tax burden which such [flat] registration fees impose upon interstate as compared with intrastate motor carriers." He pointed to the "cumulative effect" upon interstate carriers that results "from the interstate character of the journey. The same mileage in one state would result in only one tax." Lockhart, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253, 1267, 1269 (1940).

Scholarly criticism has continued to be leveled at the *Aero Mayflower* reasoning. As Professor Ernest Brown commented on *Capitol Greyhound*:

> [The Court's] recitation of the ancient learning that a state may require, even from purely interstate operators, a fair price for the use of the highways which it constructs and maintains . . . [was] indeed the incantation of an empty formula. . . . That the states build and maintain highways—in part—and that they should be allowed a price for use can be granted without viewing *Capitol Greyhound* . . . as [the] embodiment[] of great[] wisdom or understanding. Perhaps . . . the Court [will] come to have a somewhat greater perception of the significance of a nationwide system of highway transportation.

Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232 (1957).

In fact, the modern Commerce Clause decisions of this Court are grounded in a " 'practical' analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" (*Hughes* v. *Oklahoma*, 441 U.S. at 326) of "case-by-case [adjudication]" (*Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457

1959)). As a result, the Court has been compelled in recent years to overturn a number of decisions that, over the course of time, were seen to depart from sound constitutional analysis.[22] "[T]his Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore should alter the rules if necessary to protect interstate commerce from obstructive barriers." *Capitol Greyhound*, 339 U.S. at 546. Here, decisions such as *Complete Auto* represent "more recent precedent and a new analysis [that] require rejection of [the *Aero Mayflower*] reasoning" (*Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 745 (1978)). Only in this way can the Court "'establish a consistent and rational method of inquiry'" (*Commonwealth Edison*, 453 U.S. at 615) and "bring [its] analytical framework into conformity with practical realities" (*Hughes* v. *Oklahoma*, 441 U.S. at 335).

In the end, *Aero Mayflower* has become "a derelict on the waters of the law" (*Lambert* v. *California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)) and is out of harmony both with more recent Commerce Clause

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[22] See, *e.g.*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361 (1984), overruling *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) (Import-Export Clause); *Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922) (Commerce Clause); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657-668 (1981), overruling *Lincoln Nat'l Life Ins. Co.* v. *Read*, 325 U.S. 673 (1945) (Equal Protection Clause); *Hughes* v. *Oklahoma*, 441 U.S. at 326-336, overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896) (Commerce Clause); *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 743-750 (1978), overruling *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Commerce Clause); *Complete Auto*, 430 U.S. at 278-289, overruling *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951) (Commerce Clause); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872) (Import-Export Clause). See also *Northwestern States Portland Cement Co.*, 358 U.S. at 457-458.

jurisprudence and with the realities of the modern trucking industry. Flat highway taxes work to favor intrastate over interstate commerce and in-state over out-of-state trucks. That is discrimination pure and simple, and offends the central purpose of the Commerce Clause. In light of the increasing number of states that recently have enacted flat highway taxes, the time has come for the Court to so hold. Especially in the Commerce Clause area, a rule that has been rendered obsolete by subsequent legal and factual developments has no legitimate claim to continued application.

4. *The Evansville and Massachusetts Cases.* We recognize that the Court adverted to the *Aero Mayflower* line of cases in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-717 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444, 463-470 (1978). However, those decisions do not buttress the *Aero Mayflower* analysis or establish the continued vitality of its reasoning.

As explained at greater length in ATA's reply brief in the pending *Gray* case (No. 86-358 Rep. Br. 3-4), *Evansville* and *Massachusetts* did not involve a challenge to the constitutionality of flat taxes under the Commerce Clause, and they referred to *Aero Mayflower* only by way of analogy. Nor in either case was it shown that the challenged tax discriminated between in-state and out-of-state taxpayers. In fact, rather than being a discriminatory flat tax, the $1 fee in *Evansville* that was imposed on airline passengers each time they used the airport was exactly the kind of levy that, in contrast to the axle tax and marker fee, was proportional to the governmental services provided and operated to treat all users equally. The Court in *Evansville* specifically noted that "there is no showing of any inherent difference between these two classes of flights [interstate and intrastate], such that the application of the same fee to both would amount to discrimination against one or the other" (405 U.S. at 717, citing *Nippert*, *supra*). Finally, in

neither *Evansville* nor *Massachusetts* was the Court asked, as it is here, to reconsider the authority of *Aero Mayflower* in order to bring it into accord with more recent legal and factual developments.

5. *Violation of the Proportionality Requirement.* At all events, wholly apart from the issue of discrimination, the *Aero Mayflower* line of cases does not address the fourth part of the *Complete Auto* test, which requires that state taxes be fairly related to the services provided by the state. By their terms, the nondiscrimination and relatedness prongs of *Complete Auto* are distinct elements. See *Westinghouse Electric*, 466 U.S. at 399 ("'[f]airly apportioned' and 'nondiscriminatory' are not synonymous terms").

Thus, whatever their continuing relevance to the issue of discrimination, the *Aero Mayflower* cases simply do not resolve the discrete question of fair relationship. The marker fee and the axle tax are imposed to compensate the State for highway use, yet they are not proportioned to the extent of such use by the taxpayer. The Supreme Court of Pennsylvania committed fundamental error when it held (J.S. App. 29a) that the "fair relationship" requirement is satisfied if the *amount* of revenue raised by the tax is not excessive in light of the aggregate costs to the state of supporting the taxed activity. The correct inquiry is whether the *measure* of the tax is permissible. As the Court stated in *Commonwealth Edison*, 453 U.S. at 629:

> [W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce.

Neither the axle tax nor the marker fee is fairly related to the extent of the presence of interstate trucks on the highways of Pennsylvania. Accordingly, both exactions run afoul of the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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APPENDIX—NEW JERSEY RESOLUTION

PENNSYLVANIA TRUCK AXLE TAX—RETALIATORY ACTION

JOINT RESOLUTION NO. 10

SENATE JOINT RESOLUTION NO. 8019

A JOINT RESOLUTION directing the Governor of the State of New Jersey to take certain actions regarding the tax on truck axles enacted by the Commonwealth of Pennsylvania.

WHEREAS, The Commonwealth of Pennsylvania has enacted a tax on heavy trucks above 26,000 lbs. traveling within the Commonwealth of Pennsylvania in the amount of $36.00 per axle of each of those trucks; and

WHEREAS, This law went into effect on or about April 1, 1983, and is causing great hardship for the owners of trucks registered in New Jersey as well as for the owners of trucks registered in other states; and

WHEREAS, This tax is highly inequitable inasmuch as the principal burden falls upon truck owners who are not resident in Pennsylvania; and

WHEREAS, It appears that only the states of New Jersey and Oklahoma presently have legislation requiring automatic retaliatory action against the imposition of such taxes; and

WHEREAS, The State of New Jersey is proceeding under R. S. 39:3-6 to retaliate against the Commonwealth of Pennsylvania while a number of other states are contemplating similar action; and

WHEREAS, The Governors and Legislature of other states ought to adopt retaliatory measures against the Commonwealth of Pennsylvania in regard to this inequitable tax; and

WHEREAS, The Governor of this State will be in attendance at the National Governors' Conference to be held in July of this year; and

WHEREAS, It is fitting and proper that the Governor of the State urge appropriate action of a retaliatory nature against the Commonwealth of Pennsylvania for the imposition of this tax; and

WHEREAS, It is also fitting and proper that the Governor of this State request the Governor and State Legislature of the Commonwealth of Pennsylvania to reconsider the axle tax with a view to its suspension or repeal; now, therefore,

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. Governor Thomas H. Kean shall communicate to the Governors of other states in attendance at the National Governors' Conference in July of this year the desirability of taking retaliatory measures against the Commonwealth of Pennsylvania in regard to the recently enacted axle tax and of adopting other appropriate measures to correct the situation created by this inequitable tax.

2. Governor Thomas H. Kean shall request the Governor and Legislature of the Commonwealth of Pennsylvania to reconsider the recently enacted axle tax with a view to its suspension or repeal.

3. This joint resolution shall take effect immediately.

Approved and effective June 29, 1983.